

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

**AMENDMENTS TO APPLICABLE PROVISIONS     ) Administrative Cause  
OF CODE OF JUDICIAL CONDUCT FOR             ) Number: 09-121J  
COMMISSION ADMINISTRATIVE LAW JUDGES     )  
AND THE DIVISION OF HEARINGS               ) (LSA Document #10-162(F))**

**RULE PROCESSING, REPORT OF PUBLIC HEARING  
AND RECOMMENDATION FOR FINAL ADOPTION**

**1. RULE PROCESSING**

For consideration are amendments proposed to 312 IAC 3-1-2.5, which governs the applicable provisions of the code of judicial conduct for administrative law judges of the Natural Resources Commission. A few of the provisions also apply to conduct of other professionals within the Commission's Division of Hearings when they are processing adjudicatory matters governed by IC 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act"). Similar provisions govern the activities of the Office of Environmental Adjudication ("OEA"), which performs adjudicatory functions pertaining to the Indiana Department of Environmental Management.

The Commission gave preliminary adoption to the proposed permanent rule during its January 12, 2010 meeting. As reported in the pertinent portions of the minutes:

Steve Lucas presented this item. He said there are two entities within State government with statutory mandates to implement the "applicable provisions" of the Code of Judicial Conduct. These are the Division of Hearings which reviews decisions by the Department, the Geologists Licensure Board and the Soil Scientist Registration Board; and the Office of Environmental Adjudication (the "OEA") which reviews decisions by the Indiana Department of Environmental Management. The Division of Hearings worked with OEA in 2007 to propose standards that helped clarify which provisions apply. Lucas said some of the provisions in the Code of Judicial Conduct "really don't make sense for administrative law judges...such as the standards for elections and the prohibitions on judges holding proceedings that are televised." The Open Door Law provides that if someone wants to televise one of our proceedings, "we generally have to let them." In 2007, parallel rules were adopted through the Commission and by OEA.

Since these rules were implemented, Lucas said the Supreme Court changed the Code of Judicial Conduct. That in turn causes necessary amendments to 312 IAC 3-1-2.5 so "our standards match court standards".

Lucas said the Commission's administrative law judges also provide mediation services under IC 4-21.5-3-5 of AOPA. "Typically court judges don't do mediation, because of the way the Code of Judicial Conduct is written." He said the amendment to 312 IAC 3-1-2.5(e)(3) would allow an ALJ to perform mediation services outside the administrative [proceedings], as long as a fee is not charged for the service. "Where that might come up most often is when a state agency has a matter it wants mediated but the matter is not governed by AOPA. Our situation is a little bit different than the courts in this context, because the courts have general jurisdiction. We don't have general jurisdiction. For example, we don't have any jurisdiction over what the State Department of Health does relative to a package plant or a mobile home park. Our limited jurisdiction does not seemingly present the potential conflicts that a court of general jurisdiction could have." He said if the proposed rule amendments were given preliminary adoption, the Division of Hearing would again cooperate with OEA in the hearing process and to make the rules of the two entities comparable.

Robert Wright moved to give preliminary adoption of amendments to 312 IAC 3-1-2.5 which identifies provisions of the Code of Judicial Conduct which are applicable to the Commission's Division of Hearings. Mark Ahearn seconded the motion. Upon a voice vote, the motion carried.

A "notice of intent" to adopt the proposed rule amendments was posted in the Indiana REGISTER on February 17, 2010 as LSA Document #10-162. The notice identified Stephen L. Lucas as the "small business regulatory coordinator".

As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted to the Office of Management and Budget on March 19, 2010. In an August 31, 2010 letter, OMB approved the proposed fiscal analyses.

On September 8, 2010, the Division of Hearings submitted a copy of the proposed rule and corresponding "Economic Impact Statement" to the Legislative Services Agency. LSA provided an intended date for publication of September 14. On September 16, the Division of Hearings provided LSA with a "Notice of Public Hearing" (with a "Justification Statement"). Later on September 16, LSA issued to the Commission an "authorization to proceed" with the rule proposal.

A public hearing on the rule proposal was scheduled for October 18, 2010 in Room N501, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana. Notice of the public hearing and the text of the proposed amendments were posted in the Indiana REGISTER on September 22, 2010. This notice included the statement under IC 4-22-2.1-5 concerning rules affecting small businesses. The notice also included information required under IC 4-22-2-24. Notice of the public hearing with similar information was published on September 22, 2010 in the Indianapolis DAILY STAR, a newspaper of general circulation published in Marion County, Indiana. In addition, notice of the public hearing and a summary of the proposed rule were published on the calendar of the Commission's website.

## **2. REPORT OF PUBLIC HEARING AND COMMENTS**

No member of the public appeared for the public hearing or otherwise commented on the proposed rule amendments.

## **3. RECOMMENDATION FOR FINAL ADOPTION**

In 2005, the Indiana General Assembly enacted P.L. 99-2005 to address several issues regarding OEA and the Commission's Division of Hearings. In several ways, the legislation brought the governing laws for the administrative judges of these two offices closer together. One illustration is that the legislation made the Commission's administrative law judges subject to the "applicable provisions of the code of judicial conduct". IC 14-10-2-2(a)(2)(C). Similar language had existed for OEA since 1995. IC 4-21.5-7-6(b)(3). The Code of Judicial Conduct consists of rules established by the Indiana Supreme Court to govern the conduct of Indiana's court judges.

The governing laws did not specify which rules were "applicable", and a reading of the Code of Judicial Conduct suggested that some did not apply. An example is that the Code of Judicial Conduct addresses a judge's responsibilities for jury trials, but administrative proceedings involving the OEA and the NRC's Division of Hearings do not include juries. Another example is that some judges are periodically candidates for office, but this principle does not apply to Indiana's administrative law judges.

Following consultation with the Commission's AOPA Committee, the Commission adopted 312 IAC 3-1-2.5 to identify the applicable provisions of the code of judicial conduct as these pertained to the Division of Hearings. 312 IAC 3-1-2.5 became effective in early 2007. Almost simultaneously, OEA adopted a parallel rule section at 315 IAC 1-1-2.

Subsequent to the adoption of 312 IAC 3-1-2.5, the Indiana Supreme Court amended its Code of Judicial Conduct. Although the amendments incorporated new policy foci, the most notable changes were structural with the relocation of substantive provisions. The amendments proposed here to 312 IAC 3-1-2.5 would accommodate the rule section to the Code of Judicial Conduct for Indiana Supreme Court amendments through October 15, 2009.

In addition, the amendments to 312 IAC 3-1-2.5 would authorize an administrative law judge to perform mediation during the ordinary course of employment or where performed without additional compensation. Currently, the section authorizes participation in mediation that is governed by the Administrative Orders and Procedures Act at IC 4-21.4-3.5. This amendment would clarify that an administrative law judge could also perform mediation services in other legal contexts so long as those services were not for a fee.

As published for preliminary adoption, the rule amendments appear to be lawful and ripe for final adoption. Final adoption is recommended as set forth below.

Dated: October 18, 2010

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Stephen Lucas, Hearing Officer

**TITLE 312 NATURAL RESOURCES COMMISSION**

**Final Rule**  
LSA Document #10-162(F)

**DIGEST**

Amends 312 IAC 3-1-2.5, which identifies provisions of the code of judicial conduct that are applicable to administrative law judges of the Natural Resources Commission under IC 14-10-2-2, to accommodate amendments received from the Indiana Supreme Court through October 15, 2009, as well as to allow administrative law judges to provide mediation services in matters in addition to those under IC 4-21.5-3.5. Effective 30 days after filing with the Publisher.

**IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

**312 IAC 3-1-2.5**

SECTION 1. 312 IAC 3-1-2.5 IS AMENDED TO READ AS FOLLOWS:

**312 IAC 3-1-2.5 Applicable provisions of the code of judicial conduct to administrative law judges**

**Authority: IC 14-10-2-4**

**Affected: IC 4-21.5; IC 14-10-2-2**

Sec. 2.5. (a) The following definitions apply throughout this section:

(1) "Administrative law judge" means an administrative law judge for the natural resources commission.

(2) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective ~~January 1, 1999~~ **March 1, 1993** (including amendments ~~passed~~ **received** through ~~January 1, 2006~~ **October 15, 2009**).

(b) This section is intended to assist with the implementation of IC 14-10-2-2(a)(2)(C), which requires administrative law judges to comply with the applicable provisions of the code of judicial conduct.

(c) For purposes of this section, wherever in the code of judicial conduct the term:

(1) "court personnel" or a term of similar application is used, the term applies to an employee of the commission's division of hearings, other than an administrative law judge; and

(2) "judge" is used, the term applies to an administrative law judge.

(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an administrative law judge. These provisions shall be liberally construed to implement the intention of IC 14-10-2-2.

(e) The following provisions of the code of judicial conduct are inapplicable to an administrative law judge:

(1) Canon ~~3B(1)~~ **2.17** and ~~3B(13)~~ **2.8(C)**.

(2) Canon ~~4C~~ **3.2 and 3.4**.

(3) **Canon 3.9 if mediation services are provided in the ordinary course of commission employment or on a pro bono publico basis.**

(4) Canon ~~4G~~ **3.10**, to the extent that the practice of law in a representational capacity on a pro bono publico basis pursuant to the Indiana Rules of Professional Conduct, Rule 6.1 is prohibited. Such practice of law shall, however, be conducted subject to all applicable requirements of the code of judicial conduct.

~~(4)~~ (5) Canon ~~4H(2)~~ **3.15(B) and 3.15(C)**.

~~(5)~~ (6) Canon ~~5A(3), 5A(4), 5B(1), 5C, 5D, and 5F~~ **4**.

*(Natural Resources Commission; 312 IAC 3-1-2.5; filed Jan 26, 2007, 10:48 a.m.: 20070214-IR-312060107FRA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*